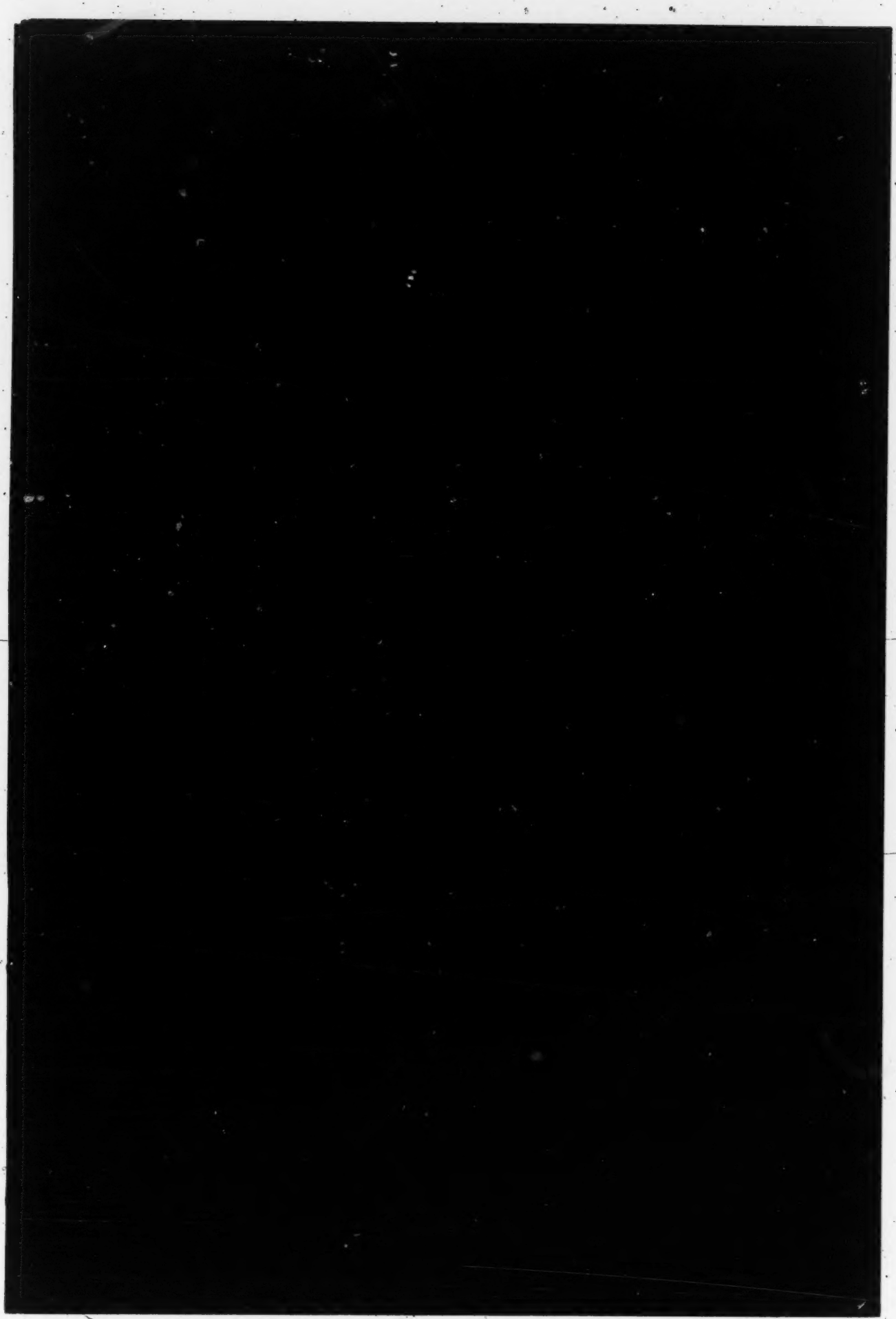

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON AND JOHN L. GLENN,

vs.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JOINT MOTION TO ADVANCE

The Appellants, Henry J. Toombs, et al. and the Appellees, Ben W. Fortson, Jr., Secretary of State of Georgia, et al. jointly move this Court to advance consideration of the above case, and in support thereof respectfully show the Court as follows:

1.

This is an appeal from a decision of the United States District Court for the Northern District of Georgia entered on March 25, 1966, in which that Court denied in part a motion to modify its previous order of April 1, 1965, which allowed the General Assembly of Georgia to use a reapportionment plan, which failed to fully meet constitutional standards, on an interim basis until May 1, 1968. The District Court did rule that full reapportion-

ment must be enacted by May 1, 1967, for the November 1968 General Election, but refused to order further immediate reapportionment for the 1966 elections.

2.

Primary elections of candidates for the General Assembly are scheduled for September 14, 1966, and all candidates must qualify at least 90 days prior thereto, June 15, 1966.

3.

An expeditious decision of the question presented by this appeal will be in the best interest of the parties in that it will dispel confusion in the minds of the electorate caused by this pending appeal.

WHEREFORE, the Appellants and the Appellees, respectfully pray that this case be advanced on the calendar and heard at the earliest possible time.

Respectfully submitted,

FRANCIS SHACKELFORD
Attorney for Appellants

ARTHUR K. BOLTON
Attorney General of Georgia
Attorney for Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

On March 25, 1966, the United States District Court for the Northern District of Georgia entered a judgment in which it refused to require valid reapportionment of each house of the General Assembly of Georgia prior to the two-year elections in 1966 and sanctioned the continued use of the unconstitutional apportionments of the Georgia House and Senate until January, 1969. This is an appeal from that judgment.

OPINION BELOW

The opinion and judgment of the District Court of March 25, 1966, which is not yet reported, is reproduced as Appendix A hereto. Earlier opinions in this case are reported as *Toombs* v. *Fortson*, 205 F.Supp. 248 (N.D. Ga.

1962); *Fortson* v. *Toombs*, 379 U.S. 621 (1965); and *Toombs* v. *Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965).

JURISDICTION

This action was brought on April 4, 1962, pursuant to 42 U.S.C. §1983 by the Appellants, residents and qualified voters of the two most populous counties in Georgia, to have the discriminatory apportionments of the Senate and House of Representatives of the General Assembly of Georgia declared unconstitutional under the Fourteenth Amendment to the Constitution of the United States. A District Court of three judges was convened pursuant to 28 U.S.C. §2281 and its jurisdiction of this action was predicated upon 28 U.S.C. §1343(3) and (4) and 28 U.S.C. §2201. The judgment of the District Court from which this appeal is taken was entered on March 25, 1966, and a notice of appeal was filed in that court on March 28, 1966.

The jurisdiction of the Supreme Court to review the decision by appeal is conferred by 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment in this case. *Swann* v. *Adams*, __U.S.__, 34 U.S. Law Week 3291 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962).

QUESTIONS PRESENTED

1. Whether the District Court, after holding the apportionments of both the House and the Senate of the Georgia General Assembly to be unconstitutional and permitting the 1965 one-year elections to proceed under the invalid plans, abused its discretion when it further permitted the two-year general elections scheduled for

September and November, 1966, to be conducted under the invalid plans, thus, postponing fair representation of the plaintiffs in the General Assembly in accordance with the decisions of this Court until at least January, 1969.

2. Whether, after finding the apportionments of both the House and Senate of the Georgia General Assembly to be unconstitutional on April 1, 1965, the District Court abused its discretion when it approved the continued use of these invalid apportionments on an interim basis for the two-year general elections in 1966, thus postponing fair reapportionment of the Georgia General Assembly until at least January 1969, notwithstanding the decision of this Court in *Swann* v. *Adams*, __U.S.__ 34 U.S. Law Week 3291 (1966).

3. Whether, in view of the fact that fair representation of the plaintiffs in the Georgia General Assembly has not yet been achieved, although this litigation was commenced in April of 1962, the further postponement and delay by the District Court of valid reapportionment until at least January 1969, constitutes a denial of Due Process and Equal Protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

STATUTES INVOLVED

The statutes directly involved are the Reapportionment of Senate, Georgia Laws 1962, September-October Extraordinary Session, page 7 (codified as Georgia Code Ann. §47-102), and the Reapportionment of the House of Representatives, Georgia Laws 1965, page 127 (codified as Georgia Code Ann. §47-101) both of which were held unconstitutional by the District Court on April 1, 1965. *Toombs* v. *Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965).

STATEMENT OF THE CASE

On April 4, 1962, the Appellants, qualified voters residing in Georgia's two most under-represented counties, brought this action to compel fair reapportionment of both houses of the Georgia General Assembly in accordance with the requirements of the Equal Protection Clause of the Constitution.

For almost 95 years, the seats in the Georgia House of Representatives had been apportioned under an arbitrary 3-2-1 system under than 22% of the people residing in 103 rural counties controlled an absolute majority of the 205 House seats. Voters residing in Echols County had almost 100 times the effective representation of the plaintiffs who resided in Fulton County.[1] Similar disparities of as much as 48 to 1 existed under the apportionment of the Senate.

On May 25, 1962, the District Court held the existing apportionment of the Georgia General Assembly to be unconstitutional and ruled "that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional standards." *Toombs* v. *Fortson*, 205 F.Supp. 248 (N.D. Ga. 1962). The court postponed further action to afford the State an opportunity to reapportion prior to the two-year general elections scheduled for November, 1962, for the term to

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[1] The glaring disparities in the apportionment of the House of Representatives under the 3-2-1 system are more fully stated in the District Court's initial opinion, *Toombs* v. *Fortson*, 205 F.Supp. 248, 251 (N.D. Ga. 1962), and are identical with the disparities existing under the Georgia county unit system. See *Gray* v. *Sanders*, 372 U.S. 368 (1963).

begin in January, 1963. In a supplemental opinion, the District Court, with Chief Judge Tuttle dissenting, declined to require both houses of the General Assembly to be apportioned more nearly on the basis of population. Order of September 5, 1962. R. 34-42.

On September 27, 1962, the General Assembly convened and, after postponing the primary elections originally scheduled for September 14, 1962, adopted a reapportionment of the more-representative Senate on October 5, 1962, leaving untouched the even more gross inequities which existed in the House. Georgia Laws 1962, September-October Extraordinary Session, page 7. Even in the Senate, however, substantial disparities remained. The largest district still exceeded the smallest by almost 2 to 1 (1.81:1), while six of the fifty four districts deviated more than 15% from average.[2]

On June 17, 1964, within two days after the decision of this Court in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the Appellants moved to compel reapportionment of the House of Representatives prior to the forthcoming two-year general elections in November 3, 1964. The appellees made no attempt to defend the constitutionality of the egregious 3-2-1 system. They asked only that reapportionment be delayed until after the 1964 elections.[3] One hundred seventy one members of the House also inter-

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[2] A more detailed analysis of the 1962 reapportionment of the Georgia Senate may be found at R. 136-40.

[3] As the court emphasized in its opinion: "The respondent, Secretary of State here contends that this is such an unusual case and that the court should not interpose any injunctive relief until after the State Legislature is given an opportunity at its regular session in 1965 to set its own House in order." Opinion of June 19, 1964, R. 50.

vened, pledging themselves to reapportion the House in accordance with constitutional standards at the 1965 session of the General Assembly.[4]

Although the General Assembly was then convened in special session,[5] and more than ample time remained prior to the elections within which fair reapportionment of the House might have been accomplished, the District Court, while declaring the apportionment of the House to be unconstitutional, refused to require that it be validly reapportioned prior to the November, 1964 elections. The court did, however, limit the terms of the Representatives to one year and expressly provided that:

> ". . . the plaintiffs shall have the right to reapply to this Court for further relief should the General Assembly, which convenes in January, 1965, fail to enact, during the regular 1965 45-day session as provided in the Georgia Constitution, such legislation as may be necessary for the General Assembly to be reapportioned *in accordance with constitutional requirements* and

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[4] "Movants allege on behalf of those who will return, and they verily believe on behalf of others yet to be elected, that in the 1965 session of the Georgia General Assembly there will be no difficulty in getting such reapportionment legislation adopted as will be necessary to comply with the Fourteenth Amendment to the United States Constitution as that Amendment is now interpreted by the Federal courts." Motion to Intervene, paragraph 11, R. 57.

[5] The General Assembly was convened in special session for the purpose of proposing an entirely new state constitution in the form of an "amendment" for ratification at the November 3, 1964 general election. In order to permit consideration of reapportionment by the special session, the Governor had only to issue a new call to its members. Ga. Const. Art. V, Sec. 1, paragraph XII, Ga. Code Ann. §2-3012.

> *as may be necessary to permit the holding of elections to the newly constituted General Assembly during the calendar year 1965*, which elections are to be held at such time as may be necessary to permit the members of such newly constituted General Assembly to take office no later than the second Monday in January, 1966."[6] (Emphasis supplied).

When the General Assembly convened in regular session in January 1965 to consider reapportionment of the House, it made no attempt to apportion the House districts "as nearly of equal population as is practicable" in accordance with the mandate of this Court in *Reynolds* v. *Sims*. Rather the General Assembly chose as its standard, not *Reynolds* v. *Sims*, but the disparities which had been created more than two years earlier in its reapportionment of the Senate.[7] The resulting apportionment of March 10, 1965, reflected this distorted philosophy. House Bill 367, Georgia Laws 1965, page 127, Ga. Code Ann. §47-101, R. 80. On March 10, 1965, the Appellees moved for confirmation of this act by the District Court, R. 76.

Under House Bill 367, the largest districts still exceed the smallest by more than 2 to 1 and an absolute majority of 103 of the 205 House seats could be elected by only 42% of the people. Two-thirds of the districts (143) deviate more than 10% from average; almost one-half

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[6] The court also enjoined the defendants from placing the proposed new state constitution, which had been drafted by the badly malapportioned legislature, on the ballot for ratification in the form of a package amendment. After the November 3, 1964 election, that injunction was vacated by this Court. *Fortson* v. *Toombs*, 379 U.S. 621 (1965).

[7] See *Toombs* v. *Fortson*, 241 F.Supp. 65, 69 (N.D. Ga. 1965).

(96) deviate more than 15% from average, while one-third of the districts (71) deviate more than 20% from average. R. 141.

House Bill 367 presents a consistent pattern of county-based over-representation of rural areas and under-representation of urban areas. Six of the seven metropolitan counties of the State continue to be under-represented by more than 15%. The 36 districts in Fulton or DeKalb Counties (Atlanta) in which the appellants reside, have an average population of 22,880. The 59 most over-represented counties still have 56 seats which represent an average population of only 14,766. Thus, it is clear that little has been done to shift the balance of rural power from that which existed under the 3-2-1 system, which guaranteed each county at least one seat. The 110 predominately rural counties which comprise the 74 most over-represented districts under House Bill 367 would have possessed 131 House seats under the old 3-2-1 system. Under the revised apportionment passed in 1965, these same 110 counties still possess an absolute majority of 103 House seats, although they contain only 42% of the population. These disparities have been increased even further by the continuing shifts in population which have occurred since the 1960 census.

On April 1, 1965, the District Court held the apportionments of both the House and the Senate to be unconstitutional. The court said:

> "The present plan of Senate apportionment in Georgia and the proposed plan of apportionment for the House of Representatives, separately and collectively, fall short of the mandate of the

> equal protection clause of the Fourteenth Amendment as construed by the Supreme Court in *Reynolds* v. *Sims* and related cases, *supra*," *Toombs* v. *Fortson*, 241 F.Supp. 65, 73, (N.D. Ga., 1965).

Notwithstanding its admonition to the contrary in its order of June 30, 1964, the District Court again refused to accord plaintiffs any effective relief or to interfere with the 1965 special elections to fill the remainder of the two-year terms. As in 1964, the District Court again permitted the elections to proceed under the unconstitutional apportionments not only for the one-year special elections of 1965, but also for the two-year primary and general elections to be held in September and November, 1966.

> "The present apportionment of the Senate and the proposed apportionment of the House are approved as interim plans of apportionment for the period ending with the end of the regular session of the General Assembly of Georgia for 1968 or May 1, 1968, whichever date may be earlier; without prejudice however to the right of the General Assembly of Georgia at any earlier date to alter the apportionment in either or both the Senate and House so as to more nearly comply with the subsisting constitutional requirement." *Toombs* v. *Fortson*, 241 F.Supp. 65, 73, (N.D. Ga., 1965).

The District Court expressly "retain[ed] jurisdiction over all matters and questions pending in the case" and no interlocutory appeal was taken.

The 1966 session of the General Assembly convened in January and met for 40 days until February 18, 1966, without making any attempt to reapportion itself in accordance with constitutional standards.

On February 25, 1966, this Court reversed a similar decision in *Swann* v. *Adams*, __U.S.__, 34 U.S. Law Week 3291 (1966) which had delayed reapportionment of the Florida legislature until 1969, and the Appellants promptly moved on March 8, 1966, in the District Court for modification of the April 1, 1965 order in accordance with the decision of this Court (R. 174), and to require that the General Assembly be reapportioned in accordance with constitutional standards prior to the biennial elections which were then more than six months away.[8] On March 25, the District Court denied the Appellants' motion. Appendix A. The court said:

> "We are not inclined to grant the further relief now being sought unless substantial similarity should appear between the facts of this case and those of *Swann* v. *Adams*, as that case was presented to the Supreme Court. We do not find such similarity . . ." [Appendix A, page 27].

The court reaffirmed its former order on grounds that:

> "The substantial progress made [in the four years since 1962], and the need to adjust the 159 counties to the new system which required House districts wherein multiple counties were

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[8] Primary elections are scheduled for September 14, 1966 (Ga. Code Ann. §34-801); qualification dates for primaries will close 90 days earlier, June 15, 1966. Ga. Code Ann. §34-1006(h). The general election will be held on November 8, 1966. Ga. Code Ann. §34-103(m), §34-802.

grouped in many instances, impelled us to grant the delay for a period of adjustment, trial and study." [Appendix A, page 30].[9]

The court deemed its postponment of fair reapportionment of the General Assembly for two additional years until January, 1969 as "only a slight withholding of relief to plaintiffs." [Appendix A, page 35].

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9. In its initial opinion on April 1, 1965, the Court justified its three-year postponement of valid reapportionment on a different basis, stating: "We are persuaded to this course by the view that the General Assembly of Georgia has been inordinately involved in apportionment since 1962, and *for that reason* have concluded to withhold further action until the end of the 1967-68 regular session of the General Assembly, or May 1, 1968, whichever may be the earlier." *Toombs* v. *Fortson*, 241 F.Supp. 65, 71, (N.D. Ga., 1965) (Emphasis supplied). This ground was apparently abandoned after this Court's summary rejection of the interim plan of the Florida legislature which had been far more "inordinately involved" in reapportionment than had the Georgia General Assembly.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This action to compel fair reapportionment of both Houses of the Georgia General Assembly was brought on April 4, 1962 by the Appellants, qualified voters residing in Georgia's two most under-represented counties. Although this action has now been pending in the District Court for more than four years, the Appellants have not yet been accorded fair representation in either House of the General Assembly. And under the judgment of the District Court of March 25, 1966, the Appellants' rights to equitable representation in the General Assembly in accordance with constitutional standards, will be further suspended for at least three additional years—until the 1969-70 session of the General Assembly convening in January, 1969—while the affairs of state are conducted under an interim apportionment which all concede to be unconstitutional. This refusal by the District Court to grant effective relief for the established constitutional rights of the Appellants is in direct conflict with the decision of this Court in *Swann* v. *Adams*, __U.S.__, 34 U.S. Law Week 3291 (1966) and constitutes an abuse of discretion.

In a series of decisions beginning with *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and culminating most recently with *Swann* v. *Adams*, __ U.S. __, 34 U.S. Law Week 3291 (1966), this Court has repeatedly emphasized that reapportionment of state legislatures in accordance with the standards of the Fourteenth Amendment must be accomplished expeditiously and without unnecessary delay. Neither considerations of legislative convenience nor of judicial deference justify the postponement of valid reapportionment where the imminence of forthcoming

elections does not make compliance with the constitutional standard impossible. As this Court emphasized in *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964):

> ". . . once a State's legislative apportionment has been found to be unconstitutional, it would be the *unusual case* in which the court would be justified in not taking appropriate action to insure that *no further elections are conducted under the invalid plan.*" (Emphasis supplied).

The only circumstances referred to by this Court as justifying a trial court in withholding equitable relief and in refusing to enjoin all further elections under an invalid plan were those in which "an impending election is imminent and a State's election machinery is already in progress." However, even this power was narrowly circumscribed, for this Court expressly held that the Alabama district court had acted with proper judicial restraint when it ordered immediate reapportionment of the Alabama legislature on July 21, 1962, "at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty," notwithstanding the fact that all candidates for election to the Alabama legislature had already been nominated in party primaries which had been held in May.

At the time of the *Reynolds* decision on June 15, 1964, Georgia's election machinery had hardly begun. Although 52 Democratic candidates for the House had already been nominated in "early primaries," the remainder of the primaries were not to be held for almost three months, until September, and the General Assembly was then convened in a special session at which the question of reapportionment might have been considered. Notwith-

standing this fact, however, the District Court, in deference to the Appellee's requests for delay, refused to require that the House be reapportioned prior to the November 1964 general elections in order to afford the General Assembly an opportunity to reapportion itself at its regular session which convened in January 1965 for a one-year term, "in accordance with *constitutional requirements.*"

Despite the assurances given the District Court on June 23, 1964 by members of the Legislature, when the General Assembly convened in January 1965, no attempt was made to apportion the House districts to be "as nearly of equal population as is practicable," as demanded by the Constitution. Instead, the General Assembly chose as its standard, not the decision of this Court in *Reynolds* v. *Sims*, but, it chose rather to follow the disparities existing under the 1962 apportionment of the Georgia Senate. Because of the glaring disparities existing in the apportionments of both the House and the Senate, the District Court on April 1, 1965, held both apportionments to be unconstitutional under the Fourteenth Amendment. However, as in 1964, the District Court again refused to afford the Appellants any effectual relief, not only for the special elections of 1965, but also for the two-year general elections of 1966, which were then more than eighteen months away. Elections under these unconstitutional apportionments were approved by the District Court on an interim basis until January, 1969.

In cases in which the imminence of impending elections made immediate reapportionment impossible, this Court has taken great care to emphasize to the lower courts that once the state legislature has been afforded an opportunity to validly reapportion itself to meet the consti-

tutional standard, it is the duty of the district courts to take appropriate steps to insure that no further elections are held under an unconstitutional scheme. Further delays in achieving constitutional compliance are not to be permitted. Thus, in the Virginia case, *Davis* v. *Mann*, 377 U.S. 678, 693 (1964), this Court directed that:

> "Since the next election of Virginia legislators will not occur until 1965, ample time remains for the Virginia Legislature to enact a constitutionally valid reapportionment scheme for purposes of that election. *After the District Court has provided the Virginia Legislature with an adequate opportunity to enact a valid plan, it can then proceed,* should it become necessary, *to grant relief under equitable principles to insure that no further elections are held under an unconstitutional scheme.*" (Emphasis supplied).

In the companion case, *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656, 676 (1964), this Court again made it emphatically clear that under no circumstances are the lower courts given the discretion to sanction the use of invalid apportionments on an interim or transitional basis in the 1966 elections. Thus, while recognizing that "... the Maryland courts need feel obligated to take further affirmative action only if the legislatures fail to enact a constitutionally valid legislative apportionment scheme in a timely fashion after being afforded a further opportunity to do so . . . ," this Court again emphasized that:

> "However, *under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant*

> *to the existing or any other unconstitutional plan.*" (Emphasis supplied).

Similarly, in *Scott* v. *Germano*, 381 U.S. 407, 409 (1965), in vacating an order of the District Court in order to permit resolution of the problem by the Illinois Supreme Court, this Court again reiterated that the continuation of an invalid apportionment scheme in the 1966 elections is not to be tolerated out of deference to the agencies of state government. This Court said:

> "The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may *validly* redistrict the Illinois State Senate; *provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election of the members of the State Senate*, . . ." (Emphasis supplied).

Despite the clear mandate of these decisions, the District Court has already sanctioned not one, but two elections for members of the General Assembly of Georgia in 1964 and in 1965 under apportionments that were clearly unconstitutional; and, unless the order of March 25, 1966 is reversed by this Court, the 1966 elections for members of the Georgia Legislature will proceed under invalid plans, with the full approval of the District Court.

Any possible question as to the authority of the District Court to sanction the use on an interim basis of an unconstitutional apportionment for the 1966 general elections has been foreclosed by the decision of this Court

in *Swann* v. *Adams*, __U.S.__, 34, U.S. Law Week 3291 (1966), in which this Court summarily reversed a virtually identical order entered by a Florida district court and patterned after the April 1, 1965 order of the District Court in the present case, which sanctioned a delay in valid reapportionment until the 1969 session of the legislature. This Court said:

> "We hold, however, that in approving the plan on an interim basis, the District Court erred. This litigation was commenced in 1962. The effect of the District Court's decision is to delay effectuation of a valid apportionment in Florida until at least 1969. While recognizing the desirability of permitting the Florida Legislature to itself determine the course of reapportionment, we find no warrant for perpetuating what all concede to be an unconstitutional apportionment for another three years.
>
> "We reverse and remand to the District Court so that a valid reapportionment plan will be made effective for the 1966 elections."

So far as counsel has been able to ascertain, the *Swann* case and the present case, on which *Swann* was patterned, are the only cases in which a district court has attempted to delay valid reapportionment of a state legislature beyond the 1966 elections.[10]

To attempt, as did this District Court, to distinguish the *Swann* case on grounds that the disparities in Florida were somewhat greater in the House (but less in the

[10] But see *O'Shields* v. *McNair*, __F. Supp.__ (W.D.S.C., decided February 28, 1966) in which the apportionment of the South Carolina Legislature was not challenged until 1965.

Senate) than in the present case, completely ignores the fact that the apportionments in both cases have been held to be *unconstitutional*. Once that determination has been made, the only remaining question is whether there is ample time before the next election to permit the promulgation of a valid apportionment by the court or the legislature. Where, as in the present case, there was more than ample time remaining prior to the September 14, 1966 primary elections and the general election on November 3, 1966, the District Court had no discretion. It was obligated to take appropriate steps to insure that no further elections are held under the unconstitutional plans. *Swann* v. *Adams*, __U.S.__, 34 U.S. Law Week 3291 (1966); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656, 676 (1964); *Davis* v. *Mann*, 377 U.S. 678, 693 (1964); *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964).

Nor can the decision of this Court in *Swann* be disregarded because the Georgia legislature had taken slightly more substantial steps to achieve reapportionment than had the legislature in Florida. This distinction completely ignores the fact that, in each case, the orders postponing reapportionment operate *prospectively* to deny the plaintiffs of their rights to be fully and fairly represented in the 1967 and the 1968 sessions of their respective legislatures.

This is not, as suggested by the District Court, "only a slight withholding of relief to the plaintiffs." The 1967 session of the Georgia General Assembly will be an appropriations session which will adopt a budget of more than one billion dollars for the biennium. A new governor is to be elected for a four-year term in the November 1966 election, and the issues and platforms of candidates

will necessarily have to be related to the composition of the malapportioned assembly. Political alignments, programs, appropriations and policies for the full length of the new governor's term will be strongly characterized by the make up of the 1967-68 session of the General Assembly. There is little to prevent an incoming malapportioned General Assembly from again seeking to have its revision of a new constitution adopted by the electorate.[11] The consequences of the Appellants being inadequately represented in these decisions can hardly be termed "slight."

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[11] See *Fortson* v. *Toombs*, 379 U.S. 621 (1965).

CONCLUSION

In view of the fact that fair reapportionment of either House of the Georgia General Assembly has not been achieved although this litigation has been pending for more than four years, the decision of the District Court, further postponing valid reapportionment of the General Assembly until 1969, constitutes an abuse of discretion which should be reversed by this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, EMMET J. BONDURANT, II, attorney for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of April, 1966, I served copies of the foregoing Motion to Advance and Jurisdictional Statement on the Appellees herein named, by mailing copies thereof in a duly addressed envelope, with postpage prepaid to Arthur K. Bolton, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia and E. Freeman Leverett, Assistant Attorney General of Georgia, attorneys of record for said appellees.

EMMET J. BONDURANT, II

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION NO. 7883

HENRY J. TOOMBS, ET AL.,

PLAINTIFFS

v.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.,

DEFENDANTS

Before TUTTLE and BELL, Circuit Judges, and MORGAN, District Judge. PER CURIAM:

OPINION AND ORDER

Plaintiffs have moved for further relief in this state legislature reapportionment litigation in light of the opinion of the Supreme Court in the Florida case of *Swann v. Adams*, 34 Law Week 3291, per curiam opinion dated February 25, 1966. They seek an order requiring immediate reapportionment of both houses of the General Assembly of Georgia so as to be effective for the 1966 elections.

We entered an order under date of April 1, 1965 approving as an interim plan the reapportionment of the Georgia Senate which was accomplished in 1962, and the reapportionment of the Georgia House which was accom-

plished in 1965. We noted that the apportionment of both the House and Senate fell somewhat short of the federal constitutional one man-one vote standard. However, it was determined that a period of trial and study of the new apportionment system was indicated so as to provide a more useful instrument of government when the General Assembly was brought within constitutional standards. We require that reapportionment be completed by May 1, 1968 so as to apply to the 1968 elections. *Toombs v. Fortson*, N.D., Ga., 1965, 241 F.Supp. 65. Plaintiffs did not appeal..

As a part of the interim plan as approved, the regular two year terms for 1965-66 of the House members were terminated and a special election was held for one year terms, i.e., for the year 1966. This one year term and the 1967-68 terms were a part of the respite granted, but the General Assembly, as reapportioned, was left free to complete the task during this period. The regular session of the Assembly of forty days for 1966 was completed prior to the filing of plaintiff's motion for further relief with which we are now concerned.

Thus a period of more than eleven months has elapsed since our last opinion and order without an appeal, a special election has taken place, and one regular session of the Assembly has been completed. However, this acquiescence in our previous order would be no bar to the further relief being sought if it should appear that the decision of the Supreme Court in *Swann v. Adams*, supra, is a binding precedent on this court, or even if it should appear to be a persuasive precedent. It is of paramount importance under our system of law that we be alert to follow Supreme Court decisions. On the other hand, our last opinion and order were entered only after full and

complete hearings, and the order represented the considered judgment of the court in applying equitable principles to the question with respect to the individual federal constitutional rights involved and the legislative process of the State of Georgia.

We are not inclined to grant the further relief now being sought unless substantial similarity should appear between the facts of this case and those of *Swann v. Adams* as that case was presented to the Supreme Court. We do not find such similarity as the following statements of facts will demonstrate. Nevertheless, further reflection has convinced us that our previous order should be modified with respect to the time within which Georgia is required to enact a constitutional plan of apportionment into law.

SUMMARY OF GEORGIA LITIGATION

This litigation was instituted by the plaintiffs on April 4, 1962 in the wake of *Baker v. Carr*, 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663. We promptly held a hearing and required on May 25, 1962 that either the House of Representatives or the Senate be apportioned on the basis of population. We retained jurisdiction pending action by the General Assembly to that end, and also pending decision of the Supreme Court in cases involving the contention that both houses of a state legislature must be apportioned according to population. *Toombs v. Fortson*, N.D. Ga., 1962, 205 F.Supp. 248. The General Assembly of Georgia promptly met and reapportioned the Senate on the basis of population. Ga. Laws 1962, extra session, pp. 7, 14. Senators were elected under this plan in 1962 for the 1963-64 term and this apportionment continues to date. The theoretical minimum of population

necessary to control a majority of the fifty four seats in the Senate was raised from 21.4 percent to 48.2 percent. The disparity from the standpoint of population as between districts and thus between residents of the districts was reduced from a ratio of 42.5 to 1 to a ratio of 1.81 to 1. The eight largest counties, with 41.26 percent of the state population, were allocated twenty one senators, or 40.7 percent of the total. The twenty two largest counties, with 57.11 percent of the population were allocated 29.5468 senators, or 54.72 percent. The average district should contain 73,021 people based on the 1960 population of Georgia. Four out of the fifty four districts are below this average by more than 15 percent while two exceed it by more than 15 percent. Three districts depart from the average by more than 18 percent.[1] There was no appeal from this order nor was there any objection to the new plan of Senate apportionment.

The Supreme Court rendered its decisions on June 15, 1964 in *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506; *WMCA, Inc. v. Lorenzo*, 1964, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568; *Maryland Committee for Fair Representation v. Tawes*, 1964, 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595; *Davis. v. Mann*, 1964,

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[1] Meanwhile the Georgia County Unit System of elections for Governor and United States Senators had been voided. *Sanders v. Gray*, N.D. Ga., 1962, 203 F.Supp. 158, modified and affirmed, 1963, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821. The ten Georgia congressional districts were redistricted by the legislature after the decision of this court in *Wesberry v. Vandiver*, N.D. Ga., 1962, 206 F.Supp. 276, was reversed on appeal, sub. nom. *Wesberry v. Sanders*, 1964, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481. This redistricting was accomplished by the General Assembly of Georgia, Ga. Laws, 1964, p. 478, and resulted in a maximum population disparity as between the new districts ranging from 16.4 percent below the desired average to 15.5 percent above the average. See *Toombs v. Fortson*, N.D. Ga., 1965, 241 F.Supp. 65 for this history.

377 U.S. 678, 84 S.Ct. 1441, 12 L.Ed.2d 609; *Roman v. Sinock*, 1964, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620; and *Lucas v. Colorado General Assembly*, 1964, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632, extending the one man-one vote principle to state legislative representation and apportionment, and to both houses in the case of bicameral legislatures. Plaintiffs then moved for additional relief on June 17, 1964 in the form of requiring reapportionment of the Georgia House of Representatives on the basis of population.

We granted relief on June 30, 1964 by voiding the apportionment section of the Constitution, Art. III, S III, par. 1, (Code Section 2-1501), and the Georgia House apportionment statute, Code Section 47-101, as conflicting with the Fourteenth Amendment. These were declared prospectively null and void after the general election to be held in 1964. The order, as previously noted, provided that the two year terms of the members of the House of Representatives elected at that time should be limited to one year, with the further provision that plaintiffs might apply for further relief in the event the House was not reapportioned in accordance with constitutional requirements during the regular session of the General Assembly which convened in January 1965. We also directed that the General Assembly enact the necessary statutes to provide for special elections during 1965 for one year House terms for the year 1966. The General Assembly reapportioned the House at this regular session, and it was this plan of apportionment which we considered in our last opinion and order. *Toombs v. Fortson*, supra. The special election was conducted and the members of the House are now serving the special one year terms and, as stated, the regular session of the Gen-

eral Assembly for 1966 has been completed. The apportionment of the House which we held to fall short of constitutional standards is depicted in the following table:

Percentage Departure From Norm	No. of Districts	Total Population of Districts
35-36.93% below	2	49,914
30-35% below	6	91,397
25-30% below	11	193,096
20-25% below	9	163,345
15-20% below	3	63,641
0-15% below	42	1,089,687
0-15% above	31	984,069
15-20% above	13	478,134
20-25% above	24	830,305

This plan brought the House from a theoretical minimum of 22.5 percent of population having a majority of the seats to 42.341 percent. The twenty two largest counties of Georgia's 159, having 57. 11 percent of the population, could elect 51.217 percent of the House members. The disparity between counties had been improved from a ratio of 98 to 1 under the old plan to 2.003 to 1 under the new plan. We stated that this plan still failed to meet the one man-one vote test, and pointed out that even a maximum variance of 15 percent, if in approvable form, would require a ratio not exceeding 1.353 to 1. The substantial progress made, and the need to adjust the 159 counties to the new system which required House districts wherein multiple counties were grouped in many instances, impelled us to grant the delay for a period of adjustment, trial and study.

SUMMARY OF FLORIDA LITIGATION

The following facts are taken from the jurisdictional statement filed by the plaintiffs in the Supreme Court in *Swann v. Adams*, supra, and from the District Court opinions rendered in the same litigation. *Sobel v. Adams*, S.D. Fla., 1962, 208 F.Supp. 316; *Sobel v. Adams*, S.D. Fla., 1963, 214 F.Supp. 811, *reversed sub. nom. Swann v. Adams*, 1964, 378 U.S. 553, 84 S.Ct. 1904, 12 L.Ed.2d 1033; *Swann v. Adams*, S.D. Fla., 1965, __F. Supp.__ (unreported); reversed, *Swann v. Adams*, 34 Law Week 3291, Supreme Court opinion dated June 25, 1966.

Under the legislative apportionment existing in Florida when the decision in *Baker v. Carr*, supra, was rendered, 12.3 percent of the State's population could elect a majority of the Senate and 14.7 percent could elect a majority of the House. The ratio of largest to smallest House District was over 100 to 1. This apportionment was held unconstitutional on July 23, 1962. *Sobel v. Adams*, 208 F.Supp. 316 (D.C. Fla., 1962). The Florida Legislature then convened in special session on July 24, 1964 and adopted a proposed constitutional amendment for submission to the people in November 1962, and enabling legislation for that amendment. This plan represented only a negligible improvement. It guaranteed each county at least one representative. The theoretical minimum for the House would have been raised only from 15 percent to 27 percent. For the Senate, the previous theoretical minimum of 12.3 percent remained between 12 and 13 percent. It was approved as constitutional by the District Court. *Sobel v. Adams*, supra, 208 F.Supp. 316.

The voters rejected this proposed plan in the November 1962 General Election, and elected senators and rep-

resentatives under the old system. Thus plaintiffs had received no relief to this date as distinguished from Georgia which had already reapportioned the Senate and held a special election in late 1962 so that the senators might serve under the new plan in 1963-64.

The Florida legislature then convened in special session in November, 1962 to no avail, but at a further special session a statutory reapportionment plan was adopted in January, 1963. This plan provided for a House in which the theoretical minimum was 27.4 percent, and a Senate in which the theoretical minimum was 14 percent.

According to the Florida statues annot., §§ 10.01 et seq., this statute increased the seats in the Senate from 38 to 43 and in the House from 95 to 112, and special elections to be held in 1963 for these extra seats provided a modicum of initial relief to plaintiffs to commence in the year 1964. On February 7, 1963, this act was upheld as a final apportionment. *Sobel v. Adams*, supra, 214 F.Supp. 811, and plaintiffs appealed.

On June 15, 1964, *Reynolds v. Sims*, and the related cases, supra, were decided by the Supreme Court. The 1963 decision in *Sobel v. Adams* was reversed on June 22, 1964 *sub nom. Swann v. Adams* and remanded "for further proceedings consistent with the views stated in *Reynolds v. Sims* . . . . " *Swann v. Adams*, 1964, 378 U.S. 553, 84 S.Ct. 1904, 12 L.Ed.2d 506. On July 20, 1964, the plaintiff moved to enjoin the placing on the November General Election ballot of a proposed constitutional amendment embodying the same 1963 legislative apportionment scheme just invalidated by the Supreme Court. The District Court declined to do so by an order dated

October 21, 1964. The amendment was rejected by the Florida voters on November 3, 1964. No action was taken on plaintiff's motion to require valid reapportionment despite urgent requests on the part of plaintiffs until January 8, 1965 at which time the court entered an order deferring further action so as to give the Florida legislature an opportunity to reapportion no later than July 1, 1965. It is well to reiterate that at this time the theoretical minimum in the House was still 27.4 percent and 14 percent in the Senate.

One special reapportionment session of the Legislature adjourned without result in June, 1965. Another was convened the same month, and a reapportionment plan was enacted on June 29, 1965. Under this legislation, the ratio of House districts varied by more than 4 to 1, and Senate districts by almost 2 to 1. The House districts ranged from 58 percent below the average to 69 percent above the average and the Senate districts from 23 percent below to 19 percent above the average. The elections under this plan were to be held as a part of the regular 1966 elections.

This legislation continued senators, elected in 1964, in office until November, 1968 even where their districts had been abolished.[2] The District Court rejected this provision. *Swann v. Adams*, 1965, (unreported). The legislation also provided that senators elected in 1964 would continue in office until November 1968 even though their districts had been expanded or contracted. One senator elected by 7 percent of the population of his new district

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[2] Florida senators are elected for four year terms while the term of Georgia senators are for two years. House members are elected for two years in both states.

would be so continued. The court did not reject this feature of the plan. We rejected a similar proposal in *Toombs v. Fortson*, supra, 1965, 241 F.Supp. 65. The legislation further provided that where more than one senator was assigned to a district of two or more counties, no two senators could reside in the same county until each county in the district had a senator. This was an effort to insure that each county had a senator. The Florida court approved this feature. We held an analogous Georgia provision unconstitutional in *Toombs v. Fortson*, supra, 1962, 205 F.Supp. 248. As to counties having more than one senator, only Dade was sub-districted, and the sub-districting was tailored to follow the lines of two congressional districts which had been declared unconstitutionally imbalanced in previous litigation in the same court. This provision was not rejected.

The plaintiffs had attacked this act on July 6, 1965. No hearing was held until November 2, 1965. A decision was rendered on December 23, 1965 declaring the apportionment unconstitutional, but approving it as an interim measure "for a period ending sixty days after the adjournment of the 1967 regular session of the Florida Legislature." Thus the 1966 elections for 1967-68 House seats and half of the four year senate seats (FSA 10.011), would go forward. The special features relating to the Senate received the disposition above noted. *Swann v. Adams*, supra, 1965. The prompt reversal by the Supreme Court followed with direction that the Florida Legislature be reapportioned on Constitutional standards in time for the 1966 elections.

The Georgia litigation is in marked contrast to the Florida litigation. The Florida Senate ratio under the 1965 plan is about the same but this came four years

after the Georgia Senate reapportionment. Moreover, the "grandfather" and residence features are sharp departures from the Georgia plan, and militate against true population apportionment. The House ratio is 4 to 1 as compared to Georgia's 2 to 1. This 1965 plan represented the first substantial relief the Florida plaintiffs had been accorded and it was to become effective only after the 1966 elections for legislative terms beginning in 1967. The Georgia plaintiffs obtained almost complete relief in the Senate in 1962 effective in January, 1963. They obtained substantial relief in the House in 1965 effective in January, 1966.

In addition, it is not without significance that the Florida District Court had been under a mandate of the Supreme Court since June 22, 1964 to apply *Reynolds v. Sims* to the Florida legislature. The Georgia plaintiffs have never appealed from the relief accorded them, nor have they ever complained of the Senate apportionment. The court refused, *sua sponte,* to approve the Senate apportionment as not altogether within constitutional standards. No one has remotely suggested that this court has not acted with dispatch at all junctures of this litigation. The Florida plaintiffs have had the burden of delay in the court as well as in the Legislature.

This court invoked its equity power in accepting the Georgia plan to the extent deemed necessary to preserve and strengthen the legislative branch of the Georgia government with only a slight withholding of relief to plaintiffs. We deemed this discretionary measure to be a wise and proper course in the interest of plaintiffs and the state. This is still our view. We do not believe to now so hold will be an abuse of discretion in view of the differ-

ence in the facts of this litigation and the Florida apportionment litigation.

Being constrained to the view that there has been no interferring authority or fact which requires that we vacate our order of April 1, 1965 in this matter, it will stand except as modified hereinafter as to time.

Paragraph I of our Order of April 1, 1965 now provides in pertinent part:

> "... The present apportionment of the Senate and the proposed apportionment of the House are approved as interim plans of apportionment for the period ending with the end of the regular session of the General Assembly of Georgia for 1968 or May 1, 1968, or whichever date may be earlier; ..."

This Order is directed to affording complete relief beginning in January 1969. That date will stand but the order will be modified so as to require apportionment of the House and Senate in keeping with federal constitutional standards not later than May 1, 1967, to be effective for the regular elections in 1968. This will provide time for this court to pass on such plan or system as may be adopted, and for any appeal from such order as may be entered. To afford complete relief in 1967 for 1968 will require another special election for one year Senate and House terms and we do not believe such a requirement to be indicated under all the facts and circumstances.

ORDER

The premises considered, it is decreed, ordered and adjudged as follows:

I.

Paragraph I of the Order in this matter of April 1, 1965 is deleted in its entirety and the following paragraph is substituted in lieu thereof:

"The present plan of Senate apportionment in Georgia and the proposed plan of apportionment for the House of Representatives, separately and collectively, fall short of the mandate of the equal protection clause of the Fourteenth Amendment as construed by the Supreme Court in *Reynolds v. Sims* and related cases, supra. The present apportionment of the Senate and the proposed apportionment of the House are approved as interim plans of apportionment for the legislative term 1967-68; without prejudice however to the right of the General Assembly of Georgia at any earlier date to alter the apportionment in either or both the Senate and House so as to more nearly comply with the subsisting constitutional requirement; and provided however that both the Senate and House must be apportioned in accordance with federal constitutional standards not later than May 1, 1967, with such apportionment to be effective for the regular 1968 elections."

II.

In all other respects the Order is reaffirmed. The motion for further relief is DENIED.

It is so ORDERED. This 25 day of March, 1966.

/s/ ELBERT P. TUTTLE
United States Circuit Judge

/s/ GRIFFIN B. BELL
United States Circuit Judge

/s/ LEWIS R. MORGAN
United States District Judge

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